UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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| MARK ROLFSEMA, | ) | |
| Petitioner, | ) | |
| v. | ) | CIVIL ACTION NO. 07-11622-PBS |
| UNITED STATES OF AMERICA, | ) | |
| Respondent. | ) | |

**MEMORANDUM AND ORDER**

April 27, 2009

Saris, U.S.D.J.

Petitioner Mark Rolfsema pled guilty to possession of child pornography and was sentenced to fifty-seven months of incarceration. Rolfsema has now filed a pro se motion under 28 U.S.C. § 2255 to vacate or set aside his sentence. As grounds, Petitioner asserts that he was denied effective assistance of trial and appellate counsel in violation of his Sixth Amendment rights; that his guilty plea was unlawfully induced; and that he was abused in prison in violation of his Eighth Amendment rights. The United States has moved for summary disposition. After a review of the record, Petitioner's motion is **DENIED**.

## I. PROCEDURAL BACKGROUND

In September 2004, the Federal Bureau of Investigation ("FBI") searched Petitioner's residence and found CDs and floppy disks containing child pornography. (Rule 11 Hr'g Tr. 14-18, June 6, 2005.)

A search warrant issued but Petitioner fled to Canada, where he was arrested by the Royal Canadian Mounted Police for illegally entering the country. (Id. at 23.)

Petitioner was held by Canadian authorities from September 24, 2004, through November 15, 2004. During his detention the Canadian authorities used a taser gun on Petitioner when he became violent. Petitioner claims that Canadian Authorities tasered him seven times and placed him in solitary confinement for 28 days. (Id. at 26-27.) He alleges that Canadian authorities left him naked for eight days, beat him on the night of October 19, 2004, forced him to go without a shower for 21 days, and threatened him every night. (Id. at 27-28.)

FBI agents took custody of Petitioner in Calais, Maine on November 15, 2004. He was held in Penobscot County Jail for two days before being transferred to Cumberland County Jail on November 17, 2004. There, he claims that guards "psychologically tortured" him for four days. (Id. at 39.) Officials then moved him to a prison in Middleton, Massachusetts, on December 1, 2004. Petitioner alleges that he was kept segregated for his first two weeks there. (Id. at 28-29.) While in Middleton, Petitioner claims that officials planted someone in his cell to steal his mail and legal materials, monitored his calls, leaked incorrect information to the media, and placed him in a cell block with sex offenders. (Id. at 29.) While in that cell block, Petitioner says he was threatened constantly for six days until he was moved to a protective custody unit around December 21, 2004. (Id. at

30.)

A federal grand jury sitting in Massachusetts indicted Petitioner on February 9, 2005, for possession of child pornography. Petitioner was initially represented by Attorney Richard Brederson, who withdrew on April 26, 2005, and was replaced by Attorney Allison O'Neil. While represented by Attorney Brederson, Petitioner entered into a plea agreement with the United States on February 23, 2005, but withdrew it one month later, on March 29. Petitioner ultimately pled guilty on June 6, 2005, without a plea agreement. During the Rule 11 hearing where he was represented by O'Neil, in response to questions by the Court, Petitioner said that he was satisfied with the representation of his attorney and that no one had threatened him or promised him anything in exchange for his guilty plea. (Id. at 5-6.) Petitioner also said that he understood that the sentence was ultimately up to the judge:

> THE COURT: All right, so basically the Probation Department computes a sentencing guideline range. They send it to me. Your attorney can object, the government can object, and I will calculate a guideline range. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: At that point I will consider sentencing factors to decide whether or not that sentencing range is reasonable. There may be reasons I shouldn't go with it. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And then I will impose a sentence that I think is fair and just taking the Guidelines into account. Do you understand that?
>
> THE DEFENDANT: Yes.

(Id. at 10.)

Petitioner also responded "Yes" when the Court asked if he understood that "if you disagree with my sentence, you cannot then withdraw your guilty plea." (Id. at 11.) The Court informed Petitioner that his plea of guilty might result in his being listed on a sex offender registry. (Id. at 6.)

On September 8, 2005, the scheduled sentencing date, Petitioner informed the Court that he wished to withdraw his guilty plea and that he wanted new counsel. (Scheduled Disposition Hr'g Tr. 7-8, Sept. 8, 2005.) He claimed that Attorney O'Neil told him that he would be sentenced to time served, and that he had only recently found this to be false. (Id. at 9.) The Court again stated that the sentence was up to the Court and gave Petitioner time to obtain new counsel and to file a motion to withdraw his plea. (Id. at 9-10.) Petitioner also asserted that he had not yet seen the Presentence Report ("PSR"). (Id. at 2.) The Court arranged for him to read a copy of the PSR that day. (Id. at 10-11.)

On September 16, 2005, Attorney Melvin Norris was assigned as Petitioner's counsel. At a status conference on October 17, 2005, the Court allowed Petitioner until November 1, 2005, to withdraw his guilty plea. On November 1, 2005, Attorney Norris filed a letter notifying the Court that Petitioner wished to maintain his guilty plea. (Docket No. 58.)

At sentencing on December 12, 2005, Attorney Norris confirmed that Petitioner did not wish to withdraw his guilty

plea. (Sentencing Hr'g Tr. 3, Dec. 12, 2005.) The Court responded by stating that "there was some question as we talked before about whether [Petitioner] wanted to withdraw the guilty plea . . . and I just wanted to make sure that it was crystal clear on the record that [Petitioner] wanted to go forward with the sentencing today. . . . Is that correct, Mr. Rolfsema?" (Id. at 3-4.) Petitioner replied, "Yes." (Id. at 4.)

In calculating Petitioner's sentence, the Court looked at the number of pornographic images in Petitioner's possession. (Id. at 6.) The Sentencing Guidelines in effect at the time provided for a two-level enhancement for possession of more than ten images, U.S.S.G. § 2G2.4(b)(2) (2004), as well as a five-level enhancement for more than 600 images, U.S.S.G. § 2G2.4(b)(5)(D) (2004). The government reported that Petitioner possessed more than 15,000 images, and Petitioner conceded that he possessed more than 600 images. (Sentencing Hr'g Tr. at 6.) Petitioner also faced an enhancement based on his possession of sadomasochistic images involving children, U.S.S.G. § 2G2.4(b)(4) (2004). Attorney Norris challenged the government position that the images were sadomasochistic and argued that Petitioner did not even possess the allegedly sadomasochistic images. (Sentencing Hr'g Tr. 7-9.) The government introduced testimony about the images from the case agent, Special Agent Melissa Lawson. (Id. at 12-18.) Attorney Norris cross-examined Lawson. (Id. at 18-21.) After hearing the testimony and reviewing the pictures, the Court found that the images were sadomasochistic

and that Petitioner more likely than not possessed the images. (Id. at 23.)

The Court sentenced Petitioner to 57 months of incarceration, at the low end of the guidelines range, to be followed by 36 months of supervised release. As conditions of release, the Court imposed polygraph testing, a limitation on computer use, no unsupervised contact with children under the age of 18, and cooperation in DNA collection as directed by the probation officer. (Docket No. 66.) The Court also ordered mental health treatment and sex offender treatment. (Id.)

Petitioner appealed his sentence, challenging both the sentencing enhancement for more than 600 images and the enhancement for sadomasochistic images and arguing that the government had raised the sadomasochistic images enhancement vindictively. United States v. Rolfsema, 468 F.3d 75, 78 (1st Cir. 2006). The First Circuit affirmed the application of both enhancements and the sentence that resulted. Id. at 79-81.

**II. DISCUSSION**

Section 2255 "provides for post-conviction relief in four instances, namely, if the petitioner's sentence (1) was imposed in violation of the Constitution, or (2) was imposed by a court that lacked jurisdiction, or (3) exceeded the statutory maximum, or (4) was otherwise subject to collateral attack." David v. United States, 134 F.3d 470, 474 (1st Cir. 1998) (citing Hill v. United States, 368 U.S. 424, 426-27 (1962)). The petitioner bears the burden of establishing the need for section

2255 relief, as well as that of showing the need for an evidentiary hearing. See Barrett v. United States, 965 F.2d 1184, 1186 (1st Cir. 1992). "An evidentiary hearing is not required where the section 2255 petition, any accompanying exhibits, and the record evidence 'plainly [reveal] . . . that the movant is not entitled to relief." Id. (quoting Rule 4(b), Rules Governing § 2255 Proceedings). Summary dismissal of a section 2255 claim is appropriate when the petition "(1) is inadequate on its face, or (2) although facially adequate, is conclusively refuted as to the alleged facts by the files and records of the case." Id. (quotation marks and citation omitted).

**1. The Sixth Amendment Claim**

Petitioner claims that he is entitled to post-conviction relief because he was denied his Sixth Amendment right to effective legal representation by trial and appellate counsel. The Supreme Court has articulated a two-part test to determine whether an attorney's performance in a particular case fell below the constitutionally required minimum:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). The

Petitioner must prove both elements by a preponderance of the evidence. Gonzalez-Soberal v. United States, 244 F.3d 273, 277 (1st Cir. 2001). The same standard applies to sentencing hearings. See Darden v. Wainwright, 477 U.S. 168, 184 (1986).

A reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686.

With respect to the Petitioner's burden to prove prejudice, he must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

**A. Attorney O'Neil's Representation**

Petitioner claims that Attorney O'Neil's representation was constitutionally deficient because she: (1) deliberately misled him into a guilty plea by telling him before his plea hearing on June 6, 2005, that he would be sentenced to time served; and (2) failed to supply him with essential written information like the

PSR, to object to the PSR, and to give the Court letters from his family and friends before the status conference that took place on September 8, 2005. Even assuming these allegations were true and that they rose to the level of ineffective assistance, they did not prejudice Petitioner, as he was given numerous opportunities to withdraw his plea and review the PSR after Attorney O'Neil's representation ended and he had new counsel.

**B. Attorney Norris' Representation**

Rolfsema also contends that Attorney Norris was ineffective because he failed to follow the Petitioner's instruction to either go to trial or to secure in writing the time served plea agreement. However, Petitioner himself confirmed that he wanted to go forward with his guilty plea at the December 12 sentencing hearing, conclusively refuting the claim that Attorney Norris failed to follow Petitioner's instructions either to go to trial or secure a "time served" plea.

Petitioner also claims that Norris was ineffective at sentencing and in his appeal of the sentencing decision. However, Attorney Norris argued against the application of both enhancements at sentencing and appealed the Court's rejection of his arguments to the First Circuit. On appeal, Attorney Norris argued that the sadomasochistic enhancements had been raised vindictively by the Government and that the Court should have applied a two-level enhancement for more than 10 images rather than a five-level enhancement for more than 600 images. Rolfsema, 468 F.3d at 78. The First Circuit ruled against

Petitioner on both claims. Id. at 79-81.

Petitioner also claims that Attorney Norris' representation was constitutionally deficient because he failed to challenge the conditions of supervised release. However, he does not explain in the habeas petition what conditions he is challenging or why they are contrary to law, and thus how failing to challenge them could be considered ineffective assistance.[1]

The other claims of ineffective assistance of counsel are without merit for the reasons explained in the government's memorandum.

**2. The Eighth Amendment Claim**

Petitioner raises an Eighth Amendment claim that he was subjected to severe and cruel abuse in prison prior to pleading guilty. Whatever the merits of Petitioner's complaint, such a claim would not invalidate a subsequent sentence issued by the District Court. See Martinez-Rivera v. Sanchez Ramos, 498 F.3d 3, 9 (1st Cir. 2007) (noting that the Eighth Amendment applies only after conviction); cf. United States v. DiRusso, 535 F.2d 673, 674 (1st Cir. 1976) (noting that § 2255 covers challenges to the legality of a sentence, not its execution). Furthermore, to the degree the Petitioner is attempting to argue that the alleged

[1] Petitioner has filed a separate motion for revision of the Court's supervised release conditions, which the Court will address in a separate ruling. His primary concern seems to be the imposition of polygraph testing. However, the First Circuit has held that such testing is not per se unreasonable. United States v. York, 357 F.3d 14, 21-25 (1st Cir. 2004) (approving the imposition of polygraph testing, but pointing out that supervised release cannot be revoked based on the "valid assertion of Fifth Amendment privilege during a polygraph examination.").

prison abuse somehow rendered his plea involuntary, he alleges only abuse that occurred more than five months prior to his Rule 11 hearing on June 6, 2005, and does not allege that he suffered any more abuse between that time and November 1, 2005, when he reaffirmed his desire to plead guilty, or December 12, 2005, when he again reaffirmed his desire to plead guilty and was sentenced. Petitioner's § 2255 motion is thus without merit.

**ORDER**

Petitioner's motion pursuant to 28 U.S.C. § 2255 is **DENIED**.

**S/PATTI B. SARIS**
United States District Judge